STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

In re: New Landing Utility, Inc.
Application for General Rate Increase Case No. 04-0610

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APPLICANT'S RESPONSE TO
INITIAL BRIEF OF
LOST NATION PROPERTY OWNER'S ASSOCIATION

New Landing Utility, Inc. ("NLU") makes this Response to the Initial Brief of the Lost Nation Property Owner's Association.

The positions asserted by the Lost Nation Property Owner's Association ("LNPOA") are a continuation of their decades-long effort to get someone else to pay for the replacement of the inadequate water distribution lines installed in the south half of this subdivision by the developer of Lost Nation before NLU was even incorporated. The Commission Staff recognizes that the people served by these old, small water lines should be the ones to pay for the replacement mains. (See, ICC Staff Exhibit 2.0-R, pp 7-8, lines 131-139.) NLU agrees. (See, Applicant's Brief, p. 14.)

There are several reasons to reject the LNPOA positions.

Opposition to the Main Replacement Charge

I. *Res Judicata* and Estoppel Bar the Claim

Counsel for the LNPOA reviews excerpts from the Order in ICC Case 57952 - the order which granted NLU its Certificate of Public Convenience and Necessity. (See, pp 2-3 of Intervenor's Brief.) He concludes "That language is clear and unambiguous. NLU had the obligation to replace the undersized mains. An obligation that it has failed to fulfill for the past 31 years." (Intervenor's Brief, p.

3.)

That counsel for the LNPOA makes this claim in 2005 is most interesting. In 1978-79, as counsel for the LNPOA, he went to the court in Ogle County and asked that the LNPOA be allowed to construct a water distribution main along Woodland Drive and connect that main to the NLU distribution system. When that installation was completed, the old, small lines were connected to this main. Why would the LNPOA follow this course if, as it now claims, NLU is obligated to provide water service and replace the old, small lines? For several years thereafter, the LNPOA charged the homeowners in the south half of Lost Nation for the water (NLU"s water) that flowed from the Woodland Drive main extension and into these old, small lines. Why would the LNPOA follow this course if, as it now claims, NLU is obligated to provide water service and replace the old, small lines?

The claim that NLU is obligated to replace these old, small water lines was never made when the LNPOA went to court in 1978-79. (The LNPOA can find out why; its counsel now was its counsel then.) But that does not matter. By the legal principle, *res judicata*, the judgment in that case stands as a bar to all claims that were raised, and all claims that could have been raised in that case. Accordingly, as a matter of law, the LNPOA cannot now assert the claim that NLU is obligated to replace the old, small water lines in the south half of Lost Nation.

If res judicata is not a bar, then estoppel is. The LNPOA cannot so easily disavow its history of actions as the owner and operator of this inadequate distribution system simply because those who are served by these old, small lines now want this Commission to shift responsibility for replacement to someone else, to wit: the rest of NLU's customers. As a more complete history of the facts related to the actions of the LNPOA, NLU incorporates by reference pages 7-13 of Exhibit NLU WS-1.

II. The Fact Belie the Claim.

Counsel for the LNPOA comments on the language of the Order in Case No. 57952. "It would appear from a review of that order that the issue of the undersized mains was before the Commission." (Intervenor's Brief, p. 2, emphasis added.) The issue of water service to Lost Nation was, indeed, before the Commission in the Certificate case. The Commission may take notice of the Record in the Certificate case. The Record shows that Commission was aware that homeowners in Lost Nation were obtaining water from several community wells and a system of small water lines that extended to individual homes. The Record shows that there were no plans for NLU to construct any facilities to serve the existing homes in Lost Nation - the homes connected to these old, small lines. Testimony was presented in March 29, 1973. The principal witness for NLU testified about the exiting homes in Lost Nation:

"Q Are they [the existing homes in Lost Nation] served by any water service?

A Yes

Q Would you describe that?

A They have water pipes in the ground. There are five or six wells that are currently supplying water to those people, and for the homes - there are about 65 homes which are currently being serviced with water. (Transcript, pp 6-7.)

* * * *

Q . . . As to the Lost Nation area, except for Unit No. 9, do you propose a water service charge?

A No.

Q What do you propose there?

A We will have to - we have no proposal at the present time. (Transcript, p 16.)

The evidence is clear: NLU did not plan or intend to provide water service to the existing homes in Lost Nation. The conjecture and speculation urged by counsel for the LNPOA should be ignored. His citations are to parts of the Order that relate to the water distribution system NLU planned to install to serve water customers in the New Landing Subdivision. NLU presented no plans for facilities to serve those in Lost Nation who were already receiving water from the shallow wells through the small lines. The two (2) inch mains discussed in the Order were proposed for certain areas in New Landing. The Commission said: Except for *cul de sacs* where mains will serve a limited number of services and cannot be extended, you may not install mains of less than six (6) inches in diameter. Maps of the service territory are clear. That description does not describe any of the old, small lines that provided service to existing homes in Lost Nation. The Order in the Certificate case imposes no obligation on NLU to replace the existing small lines in Lost Nation.

III. The Regulations and the Law Defeat the Claim

NLU is indeed obligated to provide water service within its service territory. But it is obligated to do so in accordance with the regulations and the law. The Commission's long-standing Uniform Main Extension Rule (UMER) dictates the terms for extending mains into areas where there are no NLU mains. There are no NLU mains in the south half of Lost Nation. Anyone who wants NLU to extend a new main into this area must follow the UMER. Everyone else in Lost Nation who wanted NLU to extend a new main to provide water service followed the UMER. Pursuant to the UMER, NLU did extend new mains into other areas of Lost Nation. Particularly, on White Pine Dr. (twice), on Beech Lane, on Oak Drive, on Flagg Road, on Cottonwood Court, and on Sangamon Lane. Everyone else in other parts of the service territory who wanted NLU to extend a new main to provide water service

followed the UMER. Thus, mains were extended to serve Lakewood Greens, Knollwood and Tanpan Farms (Flagg Estates).

NLU must follow the UMER, and it must conform its actions to the requirements of the Public Utilities Act, to wit: It may not provide a benefit to some that is not available to all. It may not discriminate in favor of some. It may not provide a benefit that is not set forth in the rates, rules, regulations and conditions of service approved by the Commission. For NLU to acquiesce to the Intervenor's demand would be to act in a way that violates all of these prohibitions. For the Commission to in any way base its order in this case on the Intervenor's claim that NLU must replace the old, small lines in the south half of Lost Nation would be to ignore its own regulations, especially the UMER, and the requirements of the Public Utilities Act.

The LNPOA concludes its argument by saying: "There is no justification for foisting that responsibility [to replace the old, small lines] upon NLU's customers." Foisting that responsibility upon NLU's customers suggests the real objective of the LNPOA: Impose an outcome where Armstrong must pay for the replacement mains. This is magical thinking. Neither Armstrong nor anyone else is obligated to donate to NLU the money needed to replace these lines. If NLU is required to borrow the money for the replacement mains, of course the cost (debt service) will be passed through to its customers. The debate is: Which customers? The LNPOA would have the cost spread over all customers. This would shift more that ninety percent (90%) of the cost to others. The Commission Staff and NLU would have the cost spread over the customers who will be served by the replacement mains. The UMER is one way to accomplish the objective. The proposed Main Replacement Charge is another way. Either alternative is legal. What the LNPOA suggests is not.

Opposition to Recovery of Attorney's Fees

This is really a continuation of the same argument: NLU is obligated to replace the old, small lines, so to have resisted the EPA's demand that it replace those lines was inappropriate and unnecessary. Therefore, those attorney's fees should not be included as expenses for the purposes of setting rates for service. (See, Intervenor's Brief, p. 4.)

This argument fails along with the claim that NLU must pay for the replacement mains. NLU may not ignore the UMER or the provisions of the Public Utilities Act just because the Illinois EPA wants NLU to replace the old, small lines in Lost Nation. The Illinois EPA has now acknowledged that it cannot force NLU, or anyone else, to replace those lines. Therefore, for NLU to have resisted the improper demands of the Illinois EPA was not only reasonable, but necessary. To acquiesce would be to violate several provisions of the Public Utilities Act and subject NLU to the risk of criminal prosecution.

The genesis of the problem was the decision of the LNPOA to seek a court order for installation of the Woodland Drive water main rather than to use the UMER. At that time, counsel for the LNPOA (Mr. Lowe) was fully aware of the UMER, and it was explained to the court. Had the LNPOA complied with the law, it is highly unlikely that the Ogle County enforcement case, *EPA v NLU* No. 00 CH 97, would have been filed. The evidence in that case and in this case is that if the EPA would have acknowledged that NLU was not obligated to replace the old, small lines in Lost Nation, then NLU would be and was willing to do everything the EPA asked, including bear the cost to seal the old Lost Nation wells it never owned or used and the cost to install flushing hydrants on lines that belong to someone else. Counsel for the EPA steadfastly refused, even after it was shown that they knew the EPA

had no right to require NLU or anyone else to replace the old, small lines. (See, Direct Testimony of Gene Armstrong, p. 7. See, also, Exhibit NLU WS-1, pp. 22-26.)

The suggestion of Mr. Rubin, adopted by the LNPOA, that legal fees paid to Mr. Armstrong's law firm could have been better used to accomplish repairs is sophistry. The Record in this case shows that the "approximately $200,000" is almost entirely an amount that is due to the law firm. It is not an amount that was paid to the law firm. There has been no money to pay for these legal services, and therefore, there was no money that might have been used for a different purpose. The Staff witness, Mr. Griffin, was fully aware of this fact and it is reflected in his suggestions with respect to the treatment of the legal fees expense. Either Mr. Rubin is unaware of these facts, or he tries to distort them in an effort to put Mr. Armstrong in a bad light.

Whether the legal fees may be paid to Mr. Armstrong's firm is a question that is separate from the issue of whether the amounts are reasonable. The question of whether the arrangement for legal services between NLU and Mr. Armstrong's law firm must be approved by the Commission requires an analysis of the laws and regulations that govern arrangements between a utility and its affiliated interests. NLU maintains that the arrangements for legal services did not require Commission approval because approval was waived under Section 5/7-101 and 83 Ill. Adm. Code 310.60. This argument is more fully developed in Applicant's Brief on pp 27-28. That discussion is by this reference incorporated into this Response.

Opposition to Recovery of Debt Service Expenses

This is one of the unresolved financial issues described in part XIII of Applicant's Brief. At this point, the Staff has made no allowance for funds to satisfy this obligation. The Commission authorized

the debt. Will the Commission set rates that enable NLU to pay the debt? The amount is due regardless of disputes as to whom it will eventually be paid. To ignore the obligation, and to refuse to set rates that will enable NLU to pay the obligation, is to confiscate property without due process of law. The Commission knows this would be improper. It should address this financial obligation as part of the order which sets rates for NLU.

Motion for Permission to Seek Appointment of a Receiver

These matters are more fully addressed in NLU's response to the Initial Briefs filed by the Staff and by the Intervenor, People of the State of Illinois. Suffice to say:

1. The "failure" to maintain plant facilities is directly related to the need for a substantial rate increase. In spite of the need for money for repairs and renovation of the water tower, NLU has been able to maintain its facilities so as to provide water that meets or exceeds all water quality standards. There is no question that the water tower needs to be repaired and renovated - and there is no question but that the contract for this work is in place and that the work is underway. However, there is also no question but that NLU continues to provide safe and reliable water service to its customers. In spite of the need for money for repairs and renovations of the sewerage treatment plant, NLU has been able to regularly meet effluent quality standards at its sewerage treatment plant. There is no question that parts of the sewerage treatment plant need to be repaired or replaced, notably the aeration piping and the provision for emergency stand-by power generation. However, there is also no question but that NLU continues to collect and dispose of its customers' sewerage.

2. The "failure" to carry out the conditions of its Certificate seems to be based entirely on the LNPOA claim that NLU must pay for the replacement mains. That claim is addressed, above.

3. The "failure" to obtain approval of arrangements with affiliated interests begs the question of whether approval is required or has been waived under the regulations. That issue is addressed in Case No. 04-0666.

The demand for a change in management reflects the hope that if someone less committed to compliance with the UMER and the Public Utilities Act were to gain control of NLU, the would be a greater likelihood that the LNPOA would get others to pay for the replacement of the old, small water lines in the south half of this subdivision. For more than thirty years the LNPOA has known that NLU will not willingly "foist this responsibility" onto the rest of its customers. They apparently hope someone else would.

Conclusion

NLU disagrees with the conclusions reached by the LNPOA and urges the Commission to reject them and each of them.

Respectfully submitted,

New Landing Utility, Inc.

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